

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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LEANORA RUDKOWSKI and
JAKUB RUDKOWSKI,

Plaintiffs,

- against -

FOREST GREEN PARK CEMETERY
ASSOCIATION, INC.,

Defendant.

97 CV 1677 (SJ)

MEMORANDUM
AND ORDER

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A P P E A R A N C E S:

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JOHNSON, District Judge:

Currently before this Court is Defendant's motion to transfer venue to the United States District Court of New Jersey pursuant to 28 U.S.C.A. §1404(a). Plaintiffs, in their opposition papers, moved for partial summary judgment. For the reasons stated herein, Plaintiffs' motion for summary judgment is denied and Defendant's motion to

transfer venue is granted.

BACKGROUND

Leanora Rudkowski and Jakub Rudkowski ("Plaintiffs") filed this action against Forest Green Cemetery Association, Inc. Plaintiffs are residents and citizens of New York. Complaint ¶ 1. Defendant is a citizen of New Jersey with its principal place of business in Marlboro, Monmouth County, New Jersey. Complaint ¶¶ 2-3. On October 20, 1995, Dygmas Rudkowski, husband of Leanora and father of Jakub, passed away. Complaint ¶¶ 20-21. Eight days later, Defendant sold Leanora Rudkowski a grave for the decedent, issued a deed for the grave and agreed to bury the decedent's body. Complaint ¶¶ 22-26. That same day, the decedent's body was brought to Defendant's cemetery where Defendant took custody of the body. Complaint ¶¶ 27-45. Plaintiffs allege that sometime thereafter Defendant negligently misplaced the body. On February 4, 1997, when Defendant opened the grave site that corresponded to Leanora Rudkowski's deed and the location of the decedent's grave as depicted on the cemetery map, there was no body in the grave. Complaint ¶¶ 30-35. Plaintiffs are claiming that Defendant's negligence entitles them to monetary relief for emotional and personal distress. Complaint ¶¶ 47-50, 53-55.

Defendant now moves to transfer venue to New Jersey pursuant to 28 U.S.C.A. §1404(a).

DISCUSSION

Defendant argues that “convenience” and “the interest of justice” warrant a transfer of venue to the District Court of New Jersey under 28 U.S.C.A. §1404(a).¹ Transfer under §1404(a), however, is possible only if venue is proper in the original forum and federal jurisdiction existed there. See Van Dusen v. Barrack, 376 U.S. 612, 633 (1964); see also Huntingdon Eng’g & Envtl. Inc. v. Platinum Software Corp., 882 F.Supp. 54, 56 (W.D.N.Y. 1995).

In their complaint, Plaintiffs base venue in the Eastern District of New York (“Eastern District”) pursuant to 28 U.S.C.A. §1391(a)(2). Complaint ¶ 17. Where jurisdiction is based solely on diversity of citizenship, proper venue lies in any “judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.” 28 U.S.C.A. §1391(a)(2).² Section 1391(a)(2) does not afford a party the “right to sue where any part of the claim, however small, arose.” Honda Associates, Inc. v. Nozawa Trading, Inc., 374 F.Supp. 886, 892 (S.D.N.Y. 1974). Thus, the standard must be applied narrowly to the facts of each case. Id.

1. “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” 28 U.S.C.A. §1404(a).

2. “A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in . . . (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.” 28 U.S.C.A. §1391(a)(2).

In this case, Plaintiffs assert that a “substantial part of the events or omissions” giving rise to their claim occurred in Brooklyn, New York in the Eastern District. Complaint ¶¶ 15-16. Defendant denies that any substantial part of the alleged tort occurred in this district. Answer ¶¶ 15-16. This court agrees. Plaintiffs concede that the decedent’s body was brought to Defendant’s cemetery in Marlboro, New Jersey, where Defendant took custody of and negligently misplaced the body. Complaint ¶¶ 27-29, 37 and 40. The Complaint asserts that, when the Defendant opened the grave site which corresponded to Leanora Rudkowski’s deed and the location of the decedent’s grave as depicted on the cemetery map, there was no body in the grave. Complaint ¶¶ 30-35. Based on the facts alleged in the Complaint and admitted in the Answer, it is clear that the alleged tort occurred in New Jersey and not in the Eastern District of New York. Although the Complaint also alleges in vague and conclusory terms that Defendant transacted business within the State of New York, Complaint ¶ 10, it neither details the nature and extent of those transactions, nor links Defendant’s alleged New York business transactions to Plaintiffs’ cause of action. Thus, this Court finds that venue is improper in this district.

Because venue is improperly laid in the Eastern District, this Court lacks authority to transfer venue under 28 U.S.C.A. §1404(a). However, where venue is improper, 28 U.S.C.A. §1406(a) provides an alternate means of granting a motion to transfer venue. Section 1406(a) states that in such an instance, the district court “shall

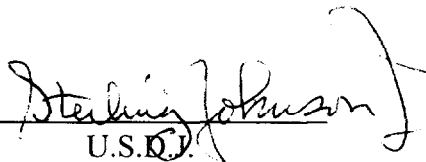
dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.” 28 U.S.C.A. §1406(a). Here, the alleged tort occurred in New Jersey. Complaint ¶¶ 27-29. As such, this action could have been properly filed in the District Court of New Jersey. Thus, this Court finds that transfer, rather than dismissal of the complaint, is the appropriate remedy as it will best serve the “interest of justice.” Accordingly, this Court lacks jurisdiction to address Plaintiffs’ motion for partial summary judgment.

CONCLUSION

For the reasons stated herein, Defendant’s motion to transfer venue to the District Court of New Jersey is granted pursuant to 28 U.S.C.A. §1406(a). Because this Court transfers this case, it does not reach the merits of Plaintiffs’ motion for partial summary judgment. The Clerk of the Court for the Eastern District of New York shall transfer all records and papers in this action to the Clerk of the Court for the District Court of New Jersey, along with a certified copy of this memorandum decision and order.

SO ORDERED.

Dated: Brooklyn, New York
July 8, 1998


U.S.D.C.